Supreme Court of the United States

October Term, 1978

No. 78-372

LAWRENCE MOSKOWITZ and
MOUNTAIN VIEW HOME FOR ADULTS,

Appellants,

against

CHARLES J. HYNES, Deputy Attorney General
of the State of New York,

Appellee.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE, TO AFFIRM THE ORDER OF THE COURT OF APPEALS

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Statement

This is an appeal from an order of the Court of Appeals of the State of New York, entered on May 4, 1978, which affirmed an order of the Supreme Court, Rockland County, entered December 8, 1977. *Matter of Hynes* v. *Moskowitz,* 44 N.Y.2d 383 (1978). The Supreme Court of Rockland County (MCNAB, J.) had granted a motion brought by the

Deputy Attorney General to compel compliance with a subpoena duces tecum issued by the Deputy Attorney General pursuant to Section 63(8) of the Executive Law. *Matter of Hynes* v. *Moskowitz,* 92 Misc.2d 495 (Rockland Co. 1977). This brief is submitted in support of a motion to dismiss this appeal or, in the alternative, to affirm the order of the Court of Appeals.

Introduction

Section 63(8) of the Executive Law of the State of New York [McKinney's Consolidated Laws, Vol. 18] provides that:

> Whenever in his judgment the public interest requires it, the attorney-general may, with the approval of the governor, and when directed by the governor, shall, inquire into matters concerning the public peace, public safety and public justice. * * * The attorney-general, his deputy, or other officer, designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under oath before himself or a magistrate and require the production of any books or papers which he deems relevant or material to the inquiry.

Pursuant to this statute, On August 2, 1976, Governor Hugh Carey issued Executive Order No. 36 addressed to Attorney General Louis Lefkowitz. This order states:

> WHEREAS, the treatment and care of elderly citizens in private proprietary homes for adults, and the management and operation of such facilities are matters concerning the public peace, public safety and public justice of the State of New York; and

> WHEREAS, the compensation for that treatment and care is derived in part from public funds, and the State of New York is responsible for licensing and supervising such facilities; and
>
> WHEREAS, there have been numerous allegations of violations of law and mistreatment of residents in such facilities; and
>
> WHEREAS, the New York State Board of Social Welfare has requested you to investigate and prosecute the alleged commission of indictable offenses relating to private proprietary homes for adults, pursuant to subdivision 3 of Section 63 of the Executive Law, and you have designated Special Deputy Attorney General Charles J. Hynes to act in these matters; and
>
> WHEREAS, Special Deputy Attorney General Charles J. Hynes has requested that I authorize an inquiry into private proprietary homes for adults, pursuant to subdivision 8 of Section 63 of the Executive Law, and had advised me that such an inquiry would be in the public interest;
>
> NOW, THEREFORE, pursuant to subdivision 8 of Section 63 of the Executive Law, and in view of the request of Special Deputy Attorney General Charles J. Hynes, I find that the public interest requires that I direct you to inquire into all matters concerning the administration, management, control, operation, supervision, funding and quality of private proprietary homes for adults, or any principal, operator, agent, supplier or other person connected therewith; and I direct you to do so in person or by your deputy to have the powers set forth in subdivision 8 for the purpose of this requirement.

9 N.Y.C.R.R. §3.36.

On October 7, 1977, a subpoena duces tecum was issued by the Deputy Attorney General, pursuant to Section 63(8), to the Mountain View Home for Adults commanding any officer or agent of the home to bring the books and records of the home to the office of the Deputy Attorney General on December 21, 1976. On the same day, this subpoena was served upon the appellant, Lawrence Moskowitz.

Moskowitz made no motion to quash the subpoena and did not comply with it.

The Deputy Attorney General then moved, pursuant to Section 2308(b) of the New York State Civil Practice Law and Rules (CPLR) [McKinney's Consolidated Laws of New York, Vol. 7B] for an order compelling the appellants to comply with the subpoena.

The appellants resisted this motion on the ground that Section 63(8) of the Executive Law and Section 2305 of the CPLR, as amended by Chapter 451 of the Laws of 1977, unconstitutionally authorize the Deputy Attorney General to retain possession of subpoenaed materials for examination and audit.

The appellants also asked the court to quash the subpoena on the ground that it was issued without any justification as part of a "fishing expedition," and on the ground that production of the records would violate the appellants' Fifth Amendment privilege against self-incrimination.

In a decision and order dated December 8, 1977, Justice McNab granted the motion to compel compliance, rejecting the appellants' arguments about the constitutionality of

Section 63(8) of the Executive Law and Section 2305 of the CPLR. The court also rejected the appellants' Fifth Amendment argument and their claim that there was no basis for issuance of the subpoena. The court found that the facts provided by the Deputy Attorney General were sufficient to justify issuance of the subpoena:

> [T]he Special Prosecutor has represented to the court a wide range of specific instances of alleged wrongdoing, including the following:
>
> That on May 29, 1977, a resident of the Mt. View Home sexually abused a three-year-old girl in the nearby Village of Haverstraw, New York, and that in the months preceding June 6, 1977, the Haverstraw Police Department had frequently been called to respondent's facility concerning a variety of other complaints, including, but not limited to a reported larceny, a possible drug overdose, and an apparent D.O.A. on respondent's premises, all of which are reflected in the official records of the Haverstraw Police Department, furnished to the court as Exhibit B; that on February 1, 1977, in defiance of the instructions of the then regulatory Board of Social Welfare, Mr. Jacob Rosenbaum, a partner in the Mt. View Home, improperly transferred some 30 residents of an adult home which had been ordered closed in Brooklyn to his facility, all 30 being released mental patients, without making the medical and financial records of these transferees avaliable to the Department of Social Services as required by law; that on November 18, 1977, Judge Edward O'Gorman, sitting in Supreme Court, Rockland County, in a case entitled *Andres* v. *Mountainview Home for Adults* (92 Misc 2d 136), enjoined and restrained the named respondents from continuing to hold plainitff Lang's Social Security and SSI checks unless and until plaintiff were to authorize the respondents, in writing, to exercise control over her checks;

> additionally, per the affirmation of Special Assistant Attorney-General Allen Mincho dated December 1, 1977, it is averred that representatives of the North Rockland Outreach Center (a unit of the Department of Mental Hygiene) have alleged that portions of residents' Social Security checks, reserved for the personal use of residents, are now being retained by Mt. View in violation of applicable State and Federal regulations.

Matter of Hynes v. *Moskowitz,* 92 Misc. 2d 495, 504 (Rockland Co. 1977.

The court, therefore, directed appellants to produce the subpoenaed records at the office of the Deputy Attorney General. The order and decision of the court were entered on December 8, 1977. Thereafter, upon a motion by the appellants, the court modified its order to direct that the subpoenaed records be produced at the office of the County Clerk to be maintained there while the appellants appealed to the Court of Appeals. On January 5, 1978, the Court of Appeals granted the appellants' motion for a stay of the subpoena pending appeal to that court.

The appellants, pursuant to CPLR 5601(b)(2), appealed this order directly to the Court of Appeals solely on the ground that the statutes involved were unconstitutional. In a decision and order dated May 4, 1978, the Court of Appeals unanimously affirmed the lower court's decision. *Matter of Hynes* v. *Moskowitz,* 44 N.Y.2d 383 (1978).

The appellants then sought a stay of the subpoena from Mr. Justice MARSHALL pending appeal to this Court. This application was denied on May 19, 1978. Thereafter, the Deputy Attorney General obtained the subpoenaed records from the Rockland County Clerk.

Statutes Involved

Section 2305(c) of the CPLR, which was added by Chapter 451 of the Laws of 1977, provides:

> (c) Inspection, examination and audit of records. Whenever by statute any department or agency of government, or officer thereof, is authorized to issue a subpoena requiring the production of books, records, documents or papers, the issuing party shall have the right to the possession of such material for a period of time, and on terms and conditions, as may reasonably be required for the inspection, examination or audit of the material. The reasonableness of such possession, time, terms, and conditions shall be determined with consideration for, among other things, (i) the good cause shown by the issuing party, (ii) the rights and needs of the person subpoenaed, and (iii) the feasibility and appropriateness of making copies of the material. The cost of reproduction and transportation incident thereto shall be borne by the person or party issuing the subpoena unless the court determines otherwise in the interest of justice.

Chapter 451 of the Laws of 1977 also amended Section 63(8) of the Executive Law by adding the material in italics indicated below:

> The attorney-general, his deputy, or other officer, designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under oath before himself or a magistrate and require *that* any books, *records, documents* or papers relevant or material to the inquiry *be turned over to him for inspection, examination or audit, pursuant to the civil practice law and rules.*

POINT I

The appellants have complied with the subpoena duces tecum whose validity they challenged. Therefore, their appeal should be dismissed as moot.

The appellants challenged the lawfulness of a subpoena duces tecum issued by the Deputy Attorney General on the ground that, under state law, this subpoena would permit the Deputy Attorney General to obtain possession of the subpoenaed material for a reasonable period of time for the purpose of his inquiry into the administration, management, control, operation, supervision, funding and quality of private proprietary homes for adults. CPLR 2305(c). They claimed that this right to possess the subpoenaed materials, without a showing of probable cause, violated the Fourth Amendment. The Court of Appeals disagreed, affirming the lower court decision directing compliance with the subpoena. *Matter of Hynes* v. *Moskowitz,* 44 N.Y.2d 383, 406 N.Y.S.2d 1 (1978). The appellants then sought to obtain a stay from Mr. Justice MARSHALL of this Court. That application was denied on May 19, 1978. Thereafter, the Deputy Attorney General obtained the subpoenaed books and records from the County Clerk of Rockland County, who had been holding them pending this litigation.

On this appeal, the appellants seek to have the Court of Appeals' decision directing compliance with the subpoena reversed. Since the subpoena has already been complied with, this relief would not restore the parties to the *status quo ante.* Therefore, the appellants' appeal should be dismissed as moot. *Cf. Defunis* v. *Odegaard,* 416 U.S. 312 (1974).

POINT II

The arguments made by the appellants in their appeal do not present a substantial federal question. Therefore, their appeal should be dismissed or, in the alternative, the order of the Court of Appeals should be affirmed.

The New York statutory scheme, which the appellants challenge, is not violative of any of the appellants' constitutional rights.

Under New York law, the Governor may, if he finds that the public peace, safety and justice require, request that the Attorney General conduct any inquiry into a matter of grave concern to the state. This authority, contained in Section 63(8) of the Executive Law, is for the purpose of advising the Governor so that he may perform his executive functions. *Matter of Sigety* v. *Hynes,* 38 N.Y.2d 260, 266 (1975); *Matter of DiBrizzi* (*Proskauer*), 303 N.Y. 206, 215-16 (1951). As stated by the Court in *DiBrizzi, supra*:

> The power here attacked is akin to that right of the Legislature to investigate and to subpoena and examine witnesses to the end of safeguarding public interests by appropriate legislation and which is so well established as to have passed beyond the realm of controversy. (*People ex rel. McDonald* v. *Keeler,* 99 N.Y. 463.)'' Thus, the only question here presented is whether the investigation directed by the Governor can reasonably be said to be for the purpose of securing information to advise him in his executive function.

One of the functions of the Governor of the State of New York is, by virtue of the State Constitution, to recom-

mend legislation. N.Y. State Constitution, Art. IV, §3 [McKinney's Consolidated Laws of New York, Vol. 2]. Therefore, the Court of Appeals' correlation of the function of a legislative subpoena and the function of an executive, 63(8) subpoena has more than analogical significance. This Court has repeatedly recognized the right of legislative commitees to obtain information for the purpose of a legitimate legislative function. *Eastland* v. *United States Serviceman's Fund*, 421 U.S. 491 (1975); *Barenblatt* v. *United States*, 360 U.S. 109 (1959); *Watkins* v. *United States*, 354 U.S. 178 (1957); *Sinclair* v. *United States*, 279 U.S. 263 (1929); *McGrain* v. *Daugherty*, 273 U.S. 135 (1927).

The Governor directed the Attorney General to conduct an inquiry into the "administration, management, control, operation, supervision, funding and quality of private proprietary homes for adults" because "the compensation for the treatment and care is derived in part from public funds, and the State of New York is responsible for licensing and supervising such facilities; and * * * there have been numerous allegations of violations of law and mistreatment of residents in such facilities * * *." 9 N.Y.C.R.R. 3.36. Section 63(8) of the Executive Law requires that the Attorney General make weekly reports to the Governor about the progress of this investigation.

The subpoena challenged by the appellants in this case was issued to Lawrence Moskowitz, the sole proprietor and owner of the Mountain View Home for Adults for specified books and records of this private proprietary adult home.

The appellants claim in their jurisdictional statement that: "The statutes challenged herein authorize the Appellee to take possession of *any* books and records that are subpoenaed, without regard to specificity or purpose to be used." Appellants' Jurisdictional Statement, at 13. And, the appellants also state that: "the entire process need not operate under a court's order, control or direction, but, due to the overhanging threat of criminal punishment, is *self-enforcing.*" Appellants' Jurisdictional Statement, at 12. This last statement is a reference to the fact that Section 63(8) provides that: "If a person subpoenaed to attend upon such inquiry fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or paper, when ordered so to do by the officer conducting such inquiry, he shall be guilty of a misdemeanor."

While it is true that Section 63(8) provides for such a sanction, it is hardly correct that this leaves a subpoenaed party without judicial protection.

Whenever a subpoena duces tecum is issued, the subpoenaed party has the right, under Section 2304 of the CPLR, to make a motion in court for an order quashing, modifying or fixing conditions with respect to such a subpoena. This motion must be made before the return date of the subpoena. No such motion was made by Lawrence Moskowitz in this case. His deliberate failure to exercise this right hardly entitles him to claim that the "entire process" is unconstitutional because it "need not operate under a court's order."

Moskowitz not only failed to make a motion to quash the subpoena, he also failed to comply with the subpoena by

producing the books and records subpoenaed on the return date of the subpoena. It was because of his deliberate choice not to seek judicial intervention, but, instead, to ignore the subpoena's command, that Moskowitz could have been proceeded against criminally without prior judicial scrutiny of the subpoena. In fact, this possibility did not occur.

The Deputy Attorney General did not proceed against Moskowitz criminally, but merely asked a justice of the Supreme Court of Rockland County to enter an order directing Moskowitz to comply with the subpoena. Moskowitz, therefore has no standing to complain about the constitutionality of what might have, but did not, happen to him. *Gange Lumber Co.* v. *Rowley,* 326 U.S. 295 (1945); *Coffman* v. *Breeze Corp.,* 323 U.S. 316 (1945); *Voeller* v. *Neilston Warehouse Co.,* 311 U.S. 531 (1941); *Tennessee Electric Power Co.* v. *Tennessee Valley Authority,* 306 U.S. 118 (1939); *Aikens* v. *Kingsbury,* 247 U.S. 484 (1918).

Moskowitz, in opposing this motion made several challenges to the legitimacy of the subpoena, including a challenge to its reasonableness, claiming that the Deputy Attorney General was, without justification, engaged in a "fishing expedition." Under federal law, it is clearly not required that a governmental agency or body issuing a subpoena duces tecum have any factual basis for believing that its investigation will disclose evidence of wrongdoing. As this Court said discussing the subpoena power of the Federal Trade Commission:

> It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analagous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

United States v. *Morton Salt Co.,* 338 U.S. 632, 642-43 (1950); *accord, United States* v. *Bisceglia,* 420 U.S. 141, 148 (1975); *United States* v. *Powell,* 379 U.S. 48, 57 (1964). Under state law, however, the New York Court of Appeals has required that whenever a non-judicial subpoena is issued by a governmental agency, that agency must show some factual basis for believing that the law is being violated. *Myerson* v. *Lentini Moving & Storage Co.,* 33 N.Y.2d 250 (1973). The appellants argued before the lower court that such a factual showing was required in this case.*

The lower court agreed and found that such a factual basis existed, based upon several specific allegations of wrongdoing which had already been brought to the attention of the Deputy Attorney General prior to the issuance of the subpoena. The appellants chose to abandon their challenge to the relevancy of the subpoenaed materials to the Deputy Attorney General's inquiry by directly appealing the lower court's decision to the Court of Appeals solely on the ground that Section 2305(c) of the CPLR and Section 63(8) of the Executive Law are unconstitutional. It is therefore remarkable that the appellants assert in their jurisdictional statement that: "The statutes challenged herein authorize the appellee to take possession of any books and records that are subpoenaed, without regard to

* The Deputy Attorney General has successfully argued in other cases that this requirement for a factual showing is not applicable to an inquiry such as the one authorized by Executive Order 36 for the purpose of advising the Governor about conditions in an entire area of health care, rather than for the purpose of exposing violations of the law. *Matter of Friedman* v. *Hi-Li Manor Home for Adults,* 42 N.Y.2d 408 (1977); *Matter of Hynes* v. *Lefkowitz,* 62 A.D.2d 365 (1st Dept. 1978).

specificity or purpose to be used." Appellants' Jurisdictional Statement, at 13.

The gravamen of the appellants' challenge to the constitutionality of Section 2305(c) of the CPLR and Section 63(8) of the Executive Law is that they permit the Deputy Attorney General to retain possession of subpoenaed materials for a reasonable period of time for the purpose of his inquiry, without requiring a showing of probable cause.* The appellants claim that this violates the Fourth Amendment prohibtion against unreasonable searches and seizures. This claim is without substance.

In *Hale* v. *Henkel,* 201 U.S. 43 (1905), this Court recognized that a subpoena duces tecum, by its very nature, requires the party subpoenaed to produce evidence for use by a fact-finding body and that it requires that he relinquish custody of the evidence for a reasonable period of time for that purpose. This Court reasoned that the similarities between the results achieved by a subpoena duces tecum and a search warrant require that the "reasonableness" standard of the Fourth Amendment be applied to a subpoena duces tecum. *Id.* at 76.

This Court has clearly and consistently followed its reasoning in *Hale* v. *Henkel, supra,* by stating that the Fourth Amendment, "if applicable" at all to a subpoena

* Section 2305(c) of the CPLR provides that a court shall determine what period of time is reasonable by considering:

(i) the good cause shown by the issuing party,

(ii) the rights and needs of the person subpoenaed, and

(iii) the feasibility and appropriateness of making copies of the material.

CPLR 2305(c).

duces tecum, is satisfied if the subpoena is reasonable, without requiring a showing of probable cause. *United States* v. *Miller,* 425 U.S. 435, 445-46 (1976); *United States* v. *Dionisio,* 410 U.S. 1, 11-12 (1973); *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 208-09 (1946).

Justice McKenna, in a concurring opinion in *Hale* v. *Henkel,* disagreed with even this limited application of the Fourth Amendment to a subpoena duces tecum. He pointed out the vast dissimilarities between a search and seizure, which is by its nature forcible, and a subpoena which depends upon voluntary compliance under court supervision. *Id.* at 80-81. However, he acknowledged that both achieved the same result: the temporary dispossession of the owner's property. Yet, as he stated, this dispossession could be limited by a court to the minimum extent required for the purpose of the inquiry being conducted:

> There can be, at most, but a temporary use of the books, and this can be accommodated to the convenience of the parties. It is matter for the court, and we cannot assume that the court will fail of consideration for the interest of the parties, or subject them to more inconvenience than the demands of justice may require.

Id. at 80.

This language is a resounding endorsement of the statute which the appellants challenge, since they explicitly require that New York courts consider the rights and legitimate needs of the subpoenaed parties and the needs of the party issuing the subpoena in determining what period of possession is reasonable. Federal courts have done this without specific statutory guidelines. See *F.T.C.* v. *Standard American, Inc.,* 306 F.2d 231, 235 (3d Cir. 1962).

The appellants are apparently willing to concede that it is constitutionally permissible for a grand jury to retain subpoenaed evidence for a reasonable period of time for the purpose of its inquiry. They cite *In re Horowitz*, 482 F.2d 72, 75 (2d Cir. 1973) (FRIENDLY, J.) as authority for this. Appellants' Jurisdictional Statement, at 8-9. However, they argue that it is unconstitutional for a non-judicial subpoena to be used to obtain temporary possession of subpoenaed materials without a showing of probable cause. They do attempt to explain the constitutional distinction between a grand jury subpoena and a non-judicial subpoena. They merely state that: "Research has failed to disclose any precedent for New York's new non-judicial subpoena duces tecum, either in this State's jurisprudence or in the jurisprudence of any other sovereign." Appellant's Jurisdictional Statement, at 8-9.

The appellants have apparently chosen to ignore the cases cited by the Deputy Attorney General in his brief to the Court of Appeals. These cases clearly recognize the right of a governmental agency issuing a non-judicial subpoena duces tecum to have temporary possession of the subpoenaed materials for the purpose of its inquiry. *United States* v. *United Distillers Products Corporation*, 156 F.2d 872, 874 (2d Cir. 1946) ("The only real question is as to the reasonableness of the requirement [of the subpoena] that defendant leave at the tax office in Hartford, twenty-five miles away, its books containing its current as well as past accounts for an investigation of possibly four months duration." Held: It is reasonable.); *McGarry* v. *Securities and Exchange Commission*, 147 F.2d 389, 393 (10th Cir. 1945) ("Finally, we do not think the district court erred in not specifying the period

of time during which the Commission might examine the documentary evidence called for in the subpoena."); *Wirtz* v. *Local No. 502*, 217 F.Supp. 155, 156 (D.N.J. 1962) ("The Secretary or his designated representatives shall be given the right to inspect and retain the original documents requested under the subpoena."); *F.T.C.* v. *Standard American, Inc.*, 195 F.Supp. 801, 802 (E.D. Pa. 1961), *aff'd*, 306 F.2d 231 (3d Cir. 1962) ("The basic issue here, therefore, is whether Section 9 of the Federal Trade Commission Act gives the Commission the authority and power to subpoena the records and having subpoenaed them, take them into their custody for investigatory purposes either in the City of Philadelphia where the respondents' place of business is located, or remove them physically to Washington, D.C." Held: it does.). None of the statutes authorizing the issuance of the subpoenas in these cases explicitly provided, as does the new legislation in New York, that a subpoena duces tecum authorizes the retention of the subpoenaed records. See 26 U.S.C. §7602 [IRS]; 15 U.S.C. §49 [FTC]; 15 U.S.C. §78u [SEC]. The courts necessarily understood that the right of these agencies to have temporary use of the subpoenaed materials was inherent in the very nature of a subpoena duces tecum.

Thus, there is clearly no merit to the Appellants' bold contention that: "The departure of New York from the traditional subpoena duces tecum and the substitution of the new subpoena duces tecum exceeds both Federal practice, the practice of other states and the Constitution." Appellants' Jurisdictional Statement at 15.

In fact, the New York statutes merely codify federal law and practice. Therefore, the appellants' challenge to the constitutionality of these statutes is frivolous.

Conclusion

The appellants' appeal should be dismissed. In the alternative, the order of the Court of Appeals should be affirmed.

Respectfully submitted,

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